SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1440

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

vs.

IKE L. REED,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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Now comes William L. Cahalan, Prosecuting Attorney in and for the County of Wayne, State of Michigan, by Patricia J. Boyle, Chief Appellate Attorney, and Thomas M. Khalil, Assistant Prosecuting Attorney and prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Michigan entered in the above-titled cause on January 21, 1975.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals, Division I, is reported at 49 Mich App 308; 212 NW2d 41 (1973) and is appended as Appendix "A". The opinion of the Michigan Supreme Court is reported at 393 Mich 342; 224 NW2d 867 (1975).

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on August 30, 1973. Application for Leave to Appeal by Respondent was granted by the Michigan Supreme Court on January 28, 1974. The judgment of the Michigan Supreme Court reversing Respondent's conviction was entered on January 21, 1975. On April 16, 1975, Mr. Justice Stewart extended the time for filing the within Petition for a Writ of Certiorari to and including May 15, 1975. The jurisdiction of this court is invoked under 28 USC Sec. 1257(3) .

QUESTIONS PRESENTED

I.

Whether a non-coerced, factually truthful statement, inculpatory in nature and not involuntary in the traditional sense may be used to impeach a defendant under *Harris v. New York*, 401 US 222; 91 S Ct 643; 28 L Ed 2d 1 (1971) and *Oregon v. Haas*, —— US ——; 95 S Ct 1215; ——L Ed 2d——(1975).

II.

Whether *Miranda v. Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966) precludes the use of a statement made in response to general on-the-scene questioning by homicide detectives who did not suspect Respondent of being the murderer.

III.

Whether the Third Amendment to the United States Constitution forbids a trial judge from instructing in a proper case that an undisputed element of the offense charged has been established.

IV

Whether *Brady v. Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963)

(a) Requires a Hearing to Discover if promises were made to a witness in exchange for his testimony when no showing whatever is made that that is the case;

(b) Removes discretion from the trial judge in the conduct of a hearing held to determine if promises were made to a witness.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense or be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

• • • • •

The Third Amendment to the United States Constitution provides in pertinent part:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; . . . . "

• • • • •

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> " . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

Respondent was tried for the First Degree Murders of Glenn Williams and Barbara Reed (no relation to Respondent). He was found guilty by jury verdict of both crimes in Detroit's Recorder's Court on March 21, 1972 (R. 855-854).[1]

The cause of death of decedent Williams was multiple gunshot wounds (R. 265). He had been shot once in the head and three times in the abdomen. Moreover, the left side of his face was swollen and he had incurred some eleven contusions about his chest (R. 260-261).

Barbara Reed's death was caused by asphyxia due to strangulation. She had been bound, hands behind her back, and gagged. Her body revealed a strangulation groove on her neck and she had suffered a fracture of the bone in her larnyx and had hemorrhaged at the based of the tongue (R. 256-257).

The evidence at trial disclosed that on June 7, 1971, at 9:00 p.m. Charles Long and John Zellner went to 959 Emerson Street in the City of Detroit to see Respondent Ike Reed (R. 281-283, 285, 370). The apartment to which they went to "hang out" was a "dope pad" (R. 720-721).

As soon as Long and Zellner entered the premises, Respondent Reed met them, gun in hand. Respondent told them he was going to kill decedent Williams because Williams had allegedly stolen Respondent's clothes (R. 285, 371). At this time decedent Williams and decedent Bar-

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[1] References prefaced by "R." refer to the pages of the trial transcript record.

bara Reed were in a back room of the apartment lying nude together (R. 290, 286-287).

Witness Long said Respondent ordered him, Long, to take a proffered hammer and hit Williams since he was going to kill him anyway (R. 287-288). Long stated that he refused and Respondent Reed immediately shot Williams in the head as he lay in bed (R. 292, 302, 372). Defendant Reed then began to pistol-whip the female about the face. Respondent then dragged the woman from the bed, gagged her to stifle her screams, and took her into the bathroom (R. 292, 304, 372-374).

Respondent Reed then filled the bathtub with water and while holding a gun in one hand tried to drown Mrs. Reed with the other. The female struggled all the while and managed to free her gag. Respondent then beat her across the back, causing her to lose her set of dentures under the bathtub (R. 293). Respondent, unsuccessful in his drowning attempt, then took the screaming woman into the front room where he forced her to the floor and proceded to have sexual intercourse with her (R. 293-294, 374-375).

Witness Zellner stated that at this point Respondent Reed put a gun to Zellner's temple and ordered him to have sexual relations with the woman. Zellner said he laid over the woman but did not have intercourse with her (R. 375-376, 464, 469-470).[2]

While Zellner went to wash the blood that had rubbed off onto his face from the bleeding woman (R. 376), Respondent Reed got a rope and put it round Mrs. Reed's

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[2] Witness Long testified that Zellner did have relations with the woman (R. 294-295).

neck. He then gave one end to Zellner and Long and pulled on it until the screaming woman made no more sounds (R. 296-298, 332-333).

Respondent Reed then got the hammer that he had earlier offered to Long (R. 287-288) and went into the back bedroom where Glenn Williams lay with his head wound. Respondent Reed then began "steady" beating him on the chest (R. 299) and skull, exhorting the victim all the while to die (R. 298, 377-388).

Respondent Reed, Long, and Zellner then began cleaning up the blood that was in the bedroom, bathroom, and kitchen. Zellner and Long dragged the two nude bodies out to the alley and left them (R. 379-381).

Respondent Reed put the dead people's clothes in a bag and told Zellner to put them in the alley, which he did (R. 299). Respondent Reed then went out to the alley and fired several shots into the bodies (R. 302).

The nude bodies of both decedents were found the next day by a police officer on foot patrol. The dead woman was still gagged and her hands were still tied behind her back (R. 543-544); she also wore the rope used to strangle her (R. 303).

After the discovery of the bodies, detectives Hill and Clemons went to the area where the bodies were found. The detectives noticed bloodstains on some cardboard in the alley and after further investigation they discovered blood stains on the rear walk, the rear stairs, and the rear door jamb of 959 Emerson (R. 714-718).

After these discoveries, the detectives called for support units to aid in a search of the premises. Three of the four apartments were checked with the assistance of the manager. The police were unable to gain entry into the fourth apartment, apartment 2 (R. 718-719).

Then, Respondent Reed entered the apartment building through the front door, went to apartment 2 and opened the door with a key. Detective Hill immediately asked Reed if they could enter and look around. Reed was very cooperative and consented to their entry (R. 720-722). While in the apartment Reed walked around with the policemen, "pointing things out" to the officers (R. 663).

Detective Hill then saw a pair of trousers on the kitchen sink with one leg soaking in blood-stained water (R. 663-664, 678, 722-724). After Hill noticed the trousers he asked Respondent whose pants they were. Respondent stated they were his (R. 664, 722). With reference to the blood-stained water, Reed said that he was playing with his cousin on Marlborough Street with a lawn mower and cut himself and got blood on the pants (R. 664, 723). Hill testified to what happened after Respondent explained the soaking pants:

> "I told him if the blood on those trousers matched the blood from the two bodies found in the alley, he was going to be in trouble." (R. 723)

Respondent was not under arrest at this time (R. 666).

Reed then altered his story and said that he found the pants on the back porch and thought they would fit him so he brought them in and tried to soak the blood out (R. 664-665, 724). He also said he had been to the apartment, which belonged to George Baker, only twice, both times to "mop up" (R. 665-666, 669). After Reed altered his statement, Detective Hill advised him of his *Miranda* rights.

Respondent was not yet arrested by the officers. He was arrested shortly thereafter when Sergeant Mary Jarrett of the Detroit Police Scientific Bureau made a field test

comparison of the pants and water and found them to match the blood in the alley (R. 666).

Detective Hill testified that they never truly suspected Reed of being the murderer. Hill thought, instead, that Reed had knowledge of what had transpired (R. 680). In the words of Hill:

> "I thought he was a flunky. I thought he was sent there to clean up the place for someone else. I never suspected Mr. Reed." (R. 680.)

Hill further stated:

> "The idea about the whole situation was, your Honor, that Ike Reed—we didn't believe Ike Reed actually was involved in the killing of these people. But we believed he had helped dispose of the bodies and helped clean up the place. We thought he might have been wearing those trousers when he cleaned up. We never suspected he was the actual killer." (R. 682.)

Sergeant Clemons, Hill's partner, testified that he felt Reed knew something about the killings (Ev. H. 36)[3] but that:

> "At that time I also had a strong suspicion that the defendant was not involved." (Ev. H. 79.)

A Motion to Suppress the Statement about the blood-stained pants was made by defense counsel, based on an alleged violation of *Miranda v. Arizona,* 384 US 474; 86

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[3] References prefaced by "Ev. H." refer to the pages of the pre-trial evidentiary hearing held before the Honorable Elvin L. Davenport on January 18 and 19, 1972.

S Ct 1602; 16 L Ed 2d 694 (1966). He argued that since no *Miranda* warnings were given defendant prior to asking him who owned the pants, Reed's response was inadmissible.

The trial court ruled the statement admissible and not in conflict with *Miranda* (R. 711).

The Michigan Court of Appeals in affirming Respondent's First Degree Murder convictions ruled that the statements were properly admissible under *Miranda v. Arizona.* The Court in its decision cited the following language from *Miranda:*[4]

> " . . . By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

The Michigan Court of Appeals stated further:

> "Our examination of the record convinces us that at the time of Officer Hill's question to defendant the status of the police inquiry was investigatory and not accusatorial in nature and defendant's statements were not made while he was in "custody or otherwise deprived of his freedom of action in any significant way". *Miranda v Arizona, supra,* 384 US 444. At the time of the statements, police officers did not believe defendant had perpetrated the killings and had no probable cause to arrest him in connection with these crimes. *People v Gilbert,* 21 Mich App 442; 175 NW2d 547 (1970), relied upon by defendant, is distinguishable on this basis."

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[4] 384 US 436 at 444; 86 S Ct 1602 at 1612.

> "Furthermore, defendant's second statement—in which he changed his story regarding ownership of the trousers—was *volunteered* after Officer Hill remarked that if the blood on the trousers matched that of the victims, defendant would be in trouble. As the *Miranda* Court noted (384 US 478): 'Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today'. (Appendix A. p 32.)

The Michigan Supreme Court reversed the Court of Appeals on this point and, citing Professor Kamisar on " 'Custodial Interrogation' Within the Meaning of *Miranda*" from *Criminal Law & the Constitution* (Reed et al. eds. 1968), held that *Miranda* is operative when an "investigation has focused on one suspect" and not when that suspect is *in custody* (Appendix B, pp 54-57). And the Court concluded that despite the fact that Respondent was not under arrest, the failure to give the *Miranda* warnings rendered the crime scene statements inadmissible (Appendix B, p. 57).

Prior to the issuance of a warrant against Reed, Respondent was questioned and in exchange for a promise that he would not be prosecuted with any statement he made (Appendix A, p 37), Reed made a full and detailed statement inculpatory in nature (R. 532-533). No question was or is made that the statement was coerced or untruthful or was involuntary in the sense that it was forcibly extracted (R. 532-533).

The Prosecution and Defense counsel agreed that the statement was inadmissible in the case-in-chief and stipulated to that effect, leaving for decision at trial the issue of its admissibility under *Harris v. New York*, 401 US

222; 91 S Ct 643; 28 L Ed 2d 1 (1971). (Appendix C, pp. 65-67); R. 532-535, 752-760).

The Court of Appeals held that the statement obtained as a result of the promises would be admissible for impeachment purposes under *Harris v. New York,* saying:

> "Defendant's contention that the suppressed statements were intrinsically unusable for impeachment purposes . . . is unfounded." (Appendix A, p. 38.)

The Michigan Supreme Court reversed the Court of Appeals and held that a statement obtained through promises, despite its truthfulness was inadmissible nonetheless under *Miranda v. Arizona* and *Harris v. New York* (Appendix B, pp. 52-53.)

At the conclusion of the proofs the trial court instructed the jury in pertinent part that:

> " . . . I am instructing you both as a matter of fact and a matter of law in connection with these proceedings, that the killings here are murder in the first degree." (R. 842.)

The Court of Appeals held that the cited instruction was not error where the issue of the degree of the crime was not in dispute (Appendix A, pp. 39-41).

The Michigan Supreme Court reversed the Court of Appeals and held the instruction violative of the rule of *United States v. England,* 347 F2d 425 (7th Cir, 1965), which held that the United States Constitution's Third Amendment right to jury trial is violated when a judge charges that an essential element has been established (Appendix B, p. 45).

During trial a hearing was held at the request of Defense Counsel to discover if John Zellner had been prom-

ised any favored treatment in exchange for his testimony (R. 509-510).

Witness Zellner testified that he had not been promised anything in exchange for testifying against Respondent Reed. Zellner stated that as far as he knew, and as far as his attorney had told him, he would be tried for First Degree Murder (R. 397-412). He further stated that he had not spoken with any assistant prosecutor concerning the case (R. 413). The assistant prosecutor trying the case denied the existence of any "deal," as did detectives Hill and Clemons. The attorney for Zellner also denied that any "deal" had been made and asserted that he fully expected Zellner to be tried for the murders (R. 524-525, 617, 633-634, 602, 607-608, 610, 612-617, 631-634, 636-639).

At the conclusion of this testimony the trial court terminated the hearing, finding that no basis existed for belief that a deal had been made (R. 631, 636). The court asked defense counsel for an offer of proof as to any promises or deals made with Zellner (R. 528-529). No such offer was ever forthcoming.

The Michigan Court of Appeals held the trial judge's exercise of discretion proper in terminating the hearing (Appendix A, p 34). The Michigan Supreme Court reversed the Court of Appeals, stating that the trial court's action violated the mandate of *Brady v. Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), in that

> " . . . once requested, such a hearing should include all witnesses and all evidence which can reasonably cast light on the question to be determined." (Appendix B, p. 50).

The Michigan Supreme Court reversed the conviction of Respondent, ordered the statements made to Detective

Hill suppressed, ordered that the statement resulting from promises be suppressed, and ordered a new trial free from an instruction that one of the elements of the crime was established.

REASONS FOR GRANTING THE WRIT

The questions presented by Petitioner are substantial Federal Constitutional issues which have yet to be addressed by this Court and which have been erroneously answered by the Michigan Supreme Court.

A.

The Michigan Supreme Court has ruled that a statement made as the result of promises made to Respondent is inadmissible for impeachment purposes under *Harris v New York*, 401 US 222, 91 S Ct 643, 28 L Ed 2d 1 (1971), despite its truthfulness and lack of coercion in the traditional sense. (Appendix B, p 51). Such a result is contrary to the *Harris* rule and is opposed to this court's holding in that case where this court said:

> "It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards."
> 401 US at 224, 91 S Ct at 645.

Moreover, the Michigan Supreme Court's decision is in violation of the rule derived from *Oregon v. Haas*,——US ——, 95 S Ct 1215, 1220-1221,——L Ed 2d——(1975). The Michigan decision is an expansion of *Miranda* for which there is no authority and it constitutes a blatant disregard of this court's holding in *Harris*.

The Petitioner urges this court to rectify the clearly erroneous decision of the Michigan Supreme Court and to rule on this question of first impression under *Miranda* and *Harris* and *Haas*.

B.

The second issue raised in this Petition presents precisely the question whether *Miranda* was intended to apply to on-the-scene general questioning.

The Michigan Supreme Court ruled that since the homicide investigation "focused" on Respondent when the blood-stained pants were seen, *Miranda* warnings were a prerequisite to any questioning despite the fact that he was not under arrest nor otherwise in custody.

Such a decision, the Petitioner contends, is diametrically opposed to the intent of *Miranda v. Arizona*, wherein it is specifically stated:

> "The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation *while in custody at the station or otherwise deprived of his freedom of action in any significant way*. It is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries. Under the system of warnings we delineate today or under any other system which may be devised and found effective, the safeguards to be erected about the privilege must come into play at this point." (Emphasis supplied.)

* * * * *

"To summarize, we hold that *when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning,* the privilege against self-incrimination is jeopardized." (Emphasis supplied.)

• • • • •

"General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." (Emphasis supplied.) 384 US at 478-479; 86 S Ct at 1629-1630.

Thus the question asked of Respondent concerning ownership of the trousers at a time when Respondent was not in custody should have been held proper by the Michigan Supreme Court as was found by the intermediate Michigan appellate court, the Court of Appeals (pp. 27-32).

Petitioner asserts that the egregious error complained of has created an anomolous situation wherein police officers at a crime scene are precluded from questioning any person at the scene without appropriate warnings, based on an alleged dictate of *Miranda v Arizona,* even though that person is not in custody. In *People v Ridley,* — Mich App —, — NW 2d — (released March 13, 1975, Docket No. 19317), the Michigan Court of Appeals followed the rule stated by the Michigan Supreme Court in the instant case.

In *Ridley,* Detroit police officers responded to a radio run of "Burglary in progress at a white house on the corner

of Seldon Street, west of Lincoln Street." When the officers arrived at the scene they found a white house on each corner. A group of people then pointed to an alley area where the police quickly went.

In the alley the police saw defendant sitting behind the wheel of a car with the motor running. One officer approached defendant and identified himself as a policeman. He then asked the whereabouts of

> ". . . the two guys that were with [him]."

Defendant told the officer they were inside of the house and he pointed out the home.

The Court of Appeals following the precedent set down by the Michigan Supreme Court *in this case* held defendant's answer to the question asked violative of *Miranda* and ordered the statement suppressed as well as a new trial granted.

Such an application of *Miranda* is totally *without* the intent of that case, Petitioner contends, and this court should now remedy the error begun by the Michigan Supreme Court in this case.

C.

The third question presented for this court's consideration has never been addressed in this forum although several Federal Courts of Appeals have decided the point.

The Michigan Supreme Court held that the trial judge erred in charging the jury that:

> ". . . I am instructing you both as a matter of fact and as a matter of law in connection with these proceedings, that the killings here are Murder in the First Degree." (Appendix B, pp 44-45; R. 842.)

The Michigan Supreme Court held that such an instruction violated the mandate of *United States v England,* 347 F 2d 425 (7th Cir, 1965), which held that as a matter of Federal constitutional law that instruction infringed upon a defendant's right to jury trial as guaranteed by the Third Amendment.

Thus, the Michigan Supreme Court has ruled that *even though the issue was never disputed,* nor could it be on the gruesome facts surrounding the deaths, Respondent's right to jury trial had been violated (Appendix B, p 47).

The Petitioner contends that such a ruling is in error as has been pointed out by the majority of Federal jurisdictions that have considered the question. *Lyons v United States,* 325 F 2d 370 (9th Cir, 1963), cert den 377 US 969, 84 S Ct 1650; 12 L Ed 2d 738 (1964); *Malone v United States,* 238 F 2d 851 (6th Cir, 1956); *Olar v United States,* 391 F 2d 773 (9th Cir, 1968); *United States v Jonikas,* 197 F 2d 675 (7th Cir, 1952), cert den 344 US 877, 73 S Ct 171, 97 L Ed 679 (1952); *United States v Mura,* 191 F 2d 886 (2d Cir, 1951); *Nordgren v United States,* 181 F 2d 718 (9th Cir, 1950) 12 Alaska 671; *United States v Scarborough,* 452 F 2d 1378, 1379 (DC 1971); *United States v Urbana,* 412 F 2d 1081 (5th Cir, 1969). As was said in *Jonikas, supra:*

> "It is not even reversible error for the court in its instructions to assume the existence of facts, the existence of which is undisputed or proved beyond controversy. 3 Am Jur, Appeal and Error, Sec. 1106." 197 F 2d at 679.

The Michigan Supreme Court, ignoring contrary authority, has thus held that as a matter of Federal Constitutional law the Third Amendment of the Federal Constitution prohibits an instruction that informs the jury that an

undisputed element of an offense has been established. That this is not the law can be seen from the cases cited by Petitioner as well as from the absence of any authority emanating from this court. Therefore, the Petitioner urges this court to grant the within Petition and review the ruling of the Michigan Supreme Court on the Third Amendment jury trial issue presented. Petitioner states that the facts in this case are clear and unequivocal on this point and present an excellent record for this court's consideration of the question.

D.

The fourth question presented involves the Michigan Supreme Court's interpretation of this Court's holding in *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

Based on the Michigan high court's decision, *Brady* v *Maryland* and the Fourteenth Amendment due process clause require that a hearing be held upon defendant's request to *discover* if any promises have been made to a witness. Moreover, the Michigan Supreme Court held that *Brady v Maryland* precluded the trial judge from terminating the hearing after every witness called, including John Zellner, denied that any promises or "deals" had been made (Appendix B, pp 48-50).

Petitioner asserts that the Michigan decision had no support whatever on *Brady v Maryl*and and that no case ever decided by this court requires the result that the State Supreme Court reached. It is a perversion of *Brady*, Petitioner contends, to permit the Michigan Court to hold that *Brady* requires a hearing to *discover* if any evidence has been suppressed (Appendix B, pp 48-50).

No evidence whatever was proffered at trial to support a contention that a "deal" or a promise had been made to

get witness Zellner to testify (R. 394, 412-413, 524-525, 602, 607-608). Indeed, the court felt that any evidence of that nature should immediately be brought to the attention of the jury and the hearing was granted by her to inquire into that subject. The failure to discover any evidence resulted in the termination of the hearing (R. 634-639).

The Michigan decision now precludes discretion of the court to terminate such a hearing, citing *Brady v Maryland*, and now a defendant can, apparently, have a hearing, upon request, and call whomsoever he pleases with no control or discretion being vested in the trial court and absent *any* evidence of suppressed evidence.

Such a result is contrary to common-sense and not in any manner derived from *Brady v Maryland.*

What *Brady* held was simply stated by this court as follows:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 US at 97; 83 S Ct at 1197.

In the present case, no evidence favorable to the accused was suppressed. No *prima facia* showing that evidence had been suppressed was made by counsel despite the opportunity given him to make an offer of proof (R. 528-529). *Brady* then is *no authority whatever* for the action of the Michigan Supreme Court and its decision constitutes an erroneous interpretation of the 14th Amendment which should not be countenanced by this Court.

CONCLUSION

It is respectfully submitted that for the reasons outlined above, the decision of the Michigan Supreme Court is in conflict with the decisions of this court and in conflict with the Third, Fifth, and Fourteenth Amendments of the United States Constitution such that plenary review should be granted in this Court and Petitioner's request for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Michigan Court of Appeals, Division I

Ike L. Reed was convicted of first-degree murder. Defendant appeals. Affirmed.

Before: J. H. Gillis, P.J., and McGregor and Adams,* JJ.

Per Curiam. Defendant appeals as of right from his conviction by jury of first-degree murder. MCLA 750.316; MSA 28.548.

Early on the morning of June 8, 1971, police officers discovered the bodies of Barbara Reed and Glenn Williams lying in an alley near the rear of an apartment building in the City of Detroit. Later that same day police discovered bloodstains and drag marks indicating that the bodies had been dragged into the alley from the apartment building. After searching the basement and three of the four apartments in the building without success, the officers observed defendant approach the door to his apartment. They allegedly requested and received defendant's permission to search the premises. Defendant was arrested after the police noticed a pair of trousers with bloodstains soaking in a sink, and defendant equivocated as to his ownership of the trousers and the origin of the bloodstains.

Defendant was tried by a jury on two separate informations charging him with first-degree murder. Charles Long and John Zellner, testifying for the prosecution, stated

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* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

that on the night of June 7, 1971 they went to the apartment in question and were admitted by defendant, who was holding a revolver in his hand and immediately told them that he wanted to "off" somebody in the back room. The trio proceeded to the rear of the apartment and observed Mrs. Reed and Williams in bed. Defendant allegedly shot Williams and, with varying degrees of assistance by Long and Zellner, strangled Mrs. Reed, after which the witness dragged the bodies into the alley and cleaned up the blood inside the apartment. Zellner and Long attributed their participation in the macabre events to their fear of defendant.

Defendant did not testify. He was convicted of first-degree murder as to both victims, was sentenced to life imprisonment in each case, and now appeals.

Issue I

Did defendant validly consent to the search of his apartment?

By way of a pretrial motion to suppress certain incriminating evidence seized by police officers in his apartment, defendant contended that he did not consent to the search and argued that the evidence had therefore been improperly seized. At an evidentiary hearing on defendant's motion, Detective Sergeant Lloyd Clemons testified that he observed defendant approach the apartment door and insert his key in the lock, whereupon Clemons identified himself as a police officer, showed defendant his badge and identification card, asked if defendant lived there and, when defendant responded affirmatively, requested and received permission "to come in and take a look around". Officer Clemons stated that the only persons present in

the hall at this time were himself, his police partner, and defendant. Defendant was not advised of his *Miranda*[1] rights at the time of entry because he was not suspected of anything at that time.

Officer Clemons' testimony was corroborated by his partner, Officer Gilbert Hill. Hill stated that defendant had not only consented to the officers' entry, but "was quite courteous and genial" and was "quite cooperative." Hill indicated that at the time of entry he, Clemons, defendant, and at least one other plain-clothes officer were present in the hallway.

The manager of the apartment building first stated that "they [the officers] was not belligerent, they didn't push him around or anything, they just told him to open the door and he opened it", but later stated that he neither heard any conversation at all between the officers and defendant nor observed anyone enter defendant's apartment at the time in question.

Defendant testified that two detectives and two patrolmen ordered him to open the door, that he told them they could not enter until they showed him a search warrant, but that the officers pushed their way into the apartment.

At the conclusion of the evidentiary hearing, the trial court ruled that defendant had validly consented to a search of his apartment. Defendant challenges the accuracy of this determination.

Defendant argued at the evidentiary hearing and now contends that he could not validly have consented to the search since the police did not first inform him that he had a constitutional right to refuse permission to search

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[1] *Miranda* v *Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694; 10 ALR3d 974 (1966).

in the absence of a search warrant.[2] In *Schneckloth v Bustamonte*, 412 US 218, 248-249; 93 S Ct 2041, 2059; 36 L Ed 2d 854, 875 (1973), the United States Supreme Court recently resolved this issue adversely to defendant's contention. The Court there concluded:

> "Our decision today is a narrow one. We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent."

The law concerning consensual searches is stated in *People v Kaigler*, 368 Mich 281, 294; 118 NW2d 406, 413 (1962), as follows:

> "It is elementary that the obtaining of a search warrant may be waived by an individual and he may give his consent to search and seizure; but such waiver or consent must be proved by clear and positive testimony *and there must be no duress or coercion, actual or implied, and the prosecutor must show a consent that is unequivocal and specific, freely and intelligently given.*" (Emphasis by the Court.)

In the light of the above-quoted standards, the trial judge did not err in deciding that defendant had validly consented to a search of his apartment.

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[2] US Const, Am IV; Const 1963, art 1, § 11.

Issue II

Did the trial court err by allowing into evidence statements made by defendant before he was advised of his constitutional rights?

During trial, defense counsel demanded and obtained an evidentiary hearing in the absence of the jury to determine the admissibility of certain statements which defendant made to police officers shortly after they entered his apartment and before they advised him of his constitutional rights under *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694; 10 ALR3d 974 (1966). At this hearing, Officer Hill testified that defendant cooperated fully with their search of his apartment by walking about with the officers and pointing things out to them. The officers noticed a pair of trousers bearing apparent bloodstains soaking in the kitchen sink. Officer Hill testified regarding this incident as follows:

"Q. What happened when you noticed the pants in the kitchen?

A. We asked Mr. Reed either if those were his trousers or whose trousers they were or whatever.

Q. Did you receive a reply?

A. Yes, sir. * * * He said they were his trousers and that the stains were blood that he had gotten on them at his home on Marlborough when he and his little cousin were playing around with the lawnmower.

Q. Did you make any response to that answer?

A. I did.

Q. What was that, sir?

A. I told him that if the blood on the trousers and the blood in the water matched the blood of the deceased, he would be in trouble.

Q. What did Mr. Reed do at this time, if anything?
A. He changed his story about the trousers.
Q. What did he indicate to you the second time?
A. That he found the trousers on the back steps.

• • • • •

Detective Hill: Found the trousers on the back steps of 959 Emerson.

• • • • •

Q. (By Mr. Bahen): Did he indicate to you why he picked them up?
A. Yes. He said that they appeared they might fit him. So he brought them in to soak the blood out of them.
Q. Now, at this time, was Mr. Reed under arrest when he made this second statement?

• • • • •

A. No. He was not placed—he wasn't placed under arrest or restricted at that time."

The witness stated that at the time of these statements he, his police partner, and two or three other officers were on the premises. According to Hill, defendant was advised of his *Miranda* rights immediately after he changed his story concerning ownership of the trousers, but he was not arrested until later when a police chemist identified the stains as blood.

On cross-examination, Officer Hill related that before entering defendant's apartment he and his partner had searched the rest of the building without discovering evidence of a homicide, and that upon entering defendant's premises the physical layout caused him to conclude immediately that the apartment was a "narcotics pad". After walking through the living room and dining room with-

out discerning evidence of the killings, Officer Hill entered the kitchen and noticed the trousers bearing what appeared to be bloodstains. The witness testified:

"Q. Did the thought occur to you at that time, Sergeant Hill, that the pants were soaking in order to get blood out of them?

A. Yes.

Q. Did you think at that point that you were getting closer and warmer to a discovery or a determination of the place of the killings of those two people?

A. We felt a lot better—I felt a lot better.

Q. You felt you were closer?

A. I felt better.

Q. Answer the question, Sergeant Hill. Did you feel closer?

A. No. I didn't feel that close at that time.

Q. What do you mean you 'felt better'?

A. I felt that after going through the apartment on the second floor in Mr. Gray's apartment and finding nothing, and seeing the blood there, I felt maybe we were on the right track. I felt a lot better.

Q. You felt maybe you were on the right track?

A. Yes.

Q. Now, at some point you told Mr. Reed that if the blood on the trousers was the same as the blood of the two deceased persons, then he, Mr. Reed, 'was in trouble,' or something to that effect?

A. Yes, sir.

Q. Wouldn't it be fair to say, Detective Hill, that if the blood in the trousers matched the blood of the deceased persons, whoever owned the trousers were *(sic)* in trouble?

A. That is true. I didn't think Mr. Reed owned the trousers.

The Court: Why didn't you think he owned the trousers, Mr. Hill?

Detective Hill: I thought he was a flunky. I thought he was sent there to clean up the place for someone else. I never suspected Mr. Reed.

* * * * *

Q. (By Mr. Ziemba): After Mr. Reed replied to you that those were indeed his trousers, you still didn't suspect Mr. Reed?

A. No, sir. We never really suspected him.

Q. Not even when you said if the blood on the the trousers is the same as the blood of the two deceased persons that he was in trouble?

A. That is true.

Q. You didn't suspect him?

A. No, we didn't. We never truly suspected him.

Q. When you asked Mr. Reed if those were indeed his trousers, did you have any idea whatever that he might say that they were?

A. My idea was that Mr. Reed knew what had happened there.

* * * * *

Q. The question is specifically, at the time you asked Mr. Reed whether those thousers were his, did you have an idea that he might say they were?

* * * * *

Detective Hill: Yes, sir. We did have some idea they might be his trousers."

Shortly thereafter, the following colloquy ensued:

"The Court: Mr. Hill, if I understood you correctly, you said you thought they could have been his pants?

Detective Hill: We thought they were his trousers.

The Court: What was your idea about the whole situation and his being there?

Detective Hill: The idea about the whole situation was, your Honor, that Ike Reed—we didn't believe Ike Reed actually was involved in the killing of these people. But we believed he had helped dispose of the bodies and helped clean up the place. We thought he might have been wearing those trousers when he cleaned up. We never suspected he was the actual killer.

The Court: And possibly, because he was cleaning up and his pants had gotten blood on them, he put them in the sink?

Detective Hill: Right."

The trial court ultimately ruled that defendant's two statements concerning the trousers had not been obtained in violation of his *Miranda* rights, and admitted these statements into evidence at trial. Defendant contends that the receipt of these statements constituted prejudicial error.

The admissibility of an accused's statements is governed by the following rule enunciated in *Miranda v Arizona, supra,* 384 US 444, as follows:

"[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

The question presented in this case is similar to that presented in *People v Watson,* 31 Mich App 638, 641-642; 188 NW2d 55, 57 (1971), where this Court stated:

> "The basic issue thus is whether at the time the statement was made the investigation had become accusatory. If the investigation had reached that stage, the defendant was entitled to be advised of his constitutional rights. [Citations omitted.] The deciding factor, in each case, is determined by examining the specificity of the investigation, *i.e.,* whether the investigation has focused on one suspect."

Our examination of the record convinces us that at the time of Officer Hill's question to defendant the status of the police inquiry was investigatory and not accusatorial in nature and defendant's statements were not made while he was in "custody or otherwise deprived of his freedom of action in any significant way". *Miranda v Arizona, supra,* 384 US 444. At the time of the statements, police officers did not believe defendant had perpetrated the killings and had no probable cause to arrest him in connection with these crimes. *People v Gilbert,* 21 Mich App 442; 175 NW2d 547 (1970), relied upon by defendant, is distinguishable on this basis. Furthermore, defendant's second statement—in which he changed his story regarding ownership of the trousers—was *volunteered* after Officer Hill remarked that if the blood on the trousers matched that of the victims, defendant would be in trouble. As the *Miranda* Court noted (384 US 478): "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today".

Under all of the facts and circumstances, the trial judge did not err in admitting the challenged statements into evidence.

Issue III

Did the trial court err by limiting the scope of an evidentiary hearing held to determine whether the prosecution had made promises to a prosecution witness?

Both defendant and John Zellner were originally charged with first-degree murder in the death of Barbara Reed, both underwent a joint preliminary examination, and both were bound over on the charge. A motion for bail made by Zellner's retained counsel, Robert Mann, was denied at the conclusion of the examination, but later Mann's motions for severance and for bail on behalf of Zellner were granted. Zellner testified for the prosecution at defendant's trial.

During the trial, defendant requested and obtained an evidentiary hearing in the absence of the jury to determine whether any promises or representations were made to Zellner by the prosecution in return for Zellner's testimony against defendant. See *Brady v Maryland,* 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). At this hearing Mann stated that he had informed Officer Hill and a representative of the prosecutor's office, Mr. Connor, that Zellner was willing to testify against defendant, but denied that he [Mann] had received any promises from either Hill or Connor that the case against Zellner would be dismissed if Zellner testified.

Officer Hill denied that he had ever promised Zellner or Mann that the case against Zellner would be dismissed if Zellner testified against defendant. Hill's police partner, Officer Clemons, denied ever having discussed the subject with Zellner, Mann, Hill, or any other police officer or member of the prosecutor's staff.

The court questioned the trial prosecutor (not under oath), and he denied that he had made any promises to Zellner either directly or indirectly. Defendant now alleges error in that he was not allowed to cross-examine the trial prosecutor and was not permitted to call Connor as a witness.

The trial judge did not err by refusing to permit cross-examination after the trial prosecutor, as an officer of the court, denied having made promises to Zellner either directly or indirectly. As for Connor, although he had been in court at the time Zellner's motion for bail was presented and did not oppose the motion, there is no evidence in the record to suggest that Connor made promises or representations to secure Zellner's testimony against defendant, and Zellner's counsel specifically denied having received any such promises from Connor. Under such circumstances, the trial judge's refusal to permit defendant to call Connor as a witness at the evidentiary hearing did not constitute an abuse of discretion.

Issue IV

Did the trial judge err by admitting into evidence three photographs of the deceased victims?

Prior to admission of three black-and-white photographs showing the victims as they were discovered, defense counsel argued that because of the testimony by witnesses Long and Zellner the photographs would be merely cumulative on the issue of premeditation and malice, that the gruesomeness of the pictures outweighed their probative value and that, if admitted, they would unduly prejudice the jury against defendant. Of six photographs proposed for introduction by the prosecution, the trial judge ruled three to be admissible.

The issue here presented is controlled by the holding in *People v Eddington,* 387 Mich 551, 562; 198 NW2d 297, 301 (1972), where the Court stated:

> "In a criminal case, the burden is upon the people to prove every element of the crime charged. These are not nice pictures but they are not any more gruesome than some of the testimony by witnesses. The pictures showed the victims as they were found. The pictures depict the *corpus delicti.* The admission of such evidence is in the sound discretion of the trial judge."

We have examined the challenged photographs and are not persuaded that the trial judge abused her discretion by admitting them into evidence.

Issue V

Did the trial judge commit reversible error by eliciting hearsay testimony from a witness?

During defense counsel's cross-examination of Officer Hill, the following ensued:

> "Q. Did you make any representations, ever, to Mr. Robert Mann that John Zellner would not be brought to trial in the case of the People vs. John Zellner if John Zellner testified against Ike Reed?
>
> A. No, sir, I didn't. I couldn't do that anyway.
>
> The Court: May we ask what conversation, if any, specifically you had with Mr. Mann?
>
> Detective Hill: Yes, you can.
>
> The Court: What conversation did you have, Mr. Hill?
>
> • • • • •

Mr. Ziemba (Interposing): I object to this procedure, your Honor.

The Court: Very well. Would you continue, please, Mr. Hill?

* * * * *

Detective Hill: This conversation took place in the Homicide Section of the Detroit Police Headquarters. I don't know the date. But Mr. Mann had been to see his client. And he told me that after talking to his client, he thought that the witness, Charles Long, was lying. And he said he thought that Charles Long attributed to John Zellner at the preliminary examination what he, Charles Long, had done himself. He thought his client was innocent. And he suggested that I go and talk to him. He was of the opinion that his client was innocent. And he suggested that I go and talk to him. He was of the opinion that his client could convince me of his innocence."

Defendant maintains that his efforts to impeach prosecution witness Zellner were heavily handicapped because Officer Hill's hearsay recitation tended to bolster Zellner's credibility. Defense counsel's efforts to attack the credibility of Zellner on the basis of prosecution promises made to Zellner apparently had no basis in fact, as is shown under Issue III, *supra*. While we agree that the trial court erred by eliciting Hill's recital of Mann's alleged comments to him, we are persuaded that the error complained of was harmless beyond a reasonable doubt.

Issue VI

Did the trial judge commit prejudicial error by declining to rule upon the admissibility for impeachment purposes of certain inculpatory statements made by defendant and suppressed before trial?

Prior to trial, certain inculpatory statements made by defendant were suppressed by court order pursuant to a stipulation between defendant and the prosecution that the statements had been elicited as a result of police promises that defendant would not be prosecuted. The suppression order specifically reserved to the trial judge the right to determine whether the suppressed statements could be utilized for impeachment purposes should defendant elect to testify at trial.

Near the conclusion of the people's case, defense counsel requested the court to decide whether the statements would be usable for impeachment purposes should defendant decide to testify. The trial judge requested an offer of proof detailing the circumstances under which the suppressed statements were given, and declined to rule anticipatorily when the offer of proof was not furnished. Defendant did not testify at trial, and now contends that the trial court erred by failing to rule that the suppressed evidence could not be used for impeachment purposes.

In *Harris v New York*, 401 US 222; 91 S Ct 643; 28 L Ed 2d 1 (1971), the United States Supreme Court held that statements obtained in violation of a defendant's *Miranda* rights could be utilized to impeach the defendant's testimony at trial. The Michigan Supreme Court in *People v Graham*, 386 Mich 452; 192 NW2d 255 (1971), quoted

Harris with approval and ruled that evidence that a defendant chose to exercise his Fifth Amendment right to remain silent during interrogation was admissible for the purpose of impeaching his testimony at trial.

Defendant's contention that the suppressed statements were intrinsically unusable for impeachment purposes therefore is unfounded. Furthermore, since the admissibility of evidence for impeachment purposes ultimately turns upon whether the evidence is inconsistent with a witness's testimony, the trial court, as a practical matter, could not rule upon the use of any specific statement until that statement could be compared with defendant's testimony. There was no error.

Issue VII

Did reversible error occur as a result of prosecutorial misconduct during closing argument?

In discussing the trial testimony of prosecution witnesses Long and Zellner, the prosecutor during closing argument stated:

> "The routine investigation somehow showed they were involved. And they were brought before you to testify. Now, why would they want to testify before Mr. Reed? Many reasons. And I am sure you will hear of many more of them. Maybe they want to save themselves. This is possible. Maybe they did it themselves and they are getting together. This is possible, also. Maybe one did it. Maybe Mr. Zellner did it and Mr. Long is trying to save Mr. Zellner. This is possible. Maybe Mr. Long did it and Mr. Zellner is trying to save Mr. Long. All of these things are possible. But the reason I think you should give some consideration

to is simply they wanted to testify because Ike Reed did it. Ike Reed *implicated them in this matter.* (Emphasis added.)

Defense counsel immediately objected that the prosecuting attorney's final statement was not supported by any evidence in the record. The prosecutor withdrew the remark. The trial judge sustained the objection, ordered the remark stricken, and instructed the jury to disregard the statement. As a result of the trial court's prompt corrective action, the error was cured and defendant was not prejudicially injured thereby.

Issue VIII

Did the trial judge err reversibly by removing from jury consideration the elements of premeditation and deliberation?

In instructing the jury, the trial judge stated:

"I am going to describe for you or define for you briefly what the charge of murder encompasses. The reason I am not going to go into it with you in any more extensive detail is the fact that there has been no dispute about the fact here that the offense charged, that is murder in the first degree, is the offense that was committed. The issue, of course, will be whether the defendant is guilty of committing that offense.

"Now, murder at common law, and as charged in this information, is defined as being where a person or persons of sound memory and discretion wilfully and unlawfully kill any human being against the peace of the State with malice aforethought expressed or implied. Murder of the first degree is a killing done

wilfully and with premeditation. And when we talk about premeditation, we mean to consider or plan the act of killing beforehand. *And as I have said, I am instructing you both as a matter of fact and as a matter of law in connection with these proceedings, that the killings here are murder in the first degree.*" (Emphasis added.)

Defendant objected to this instruction.

The trial court, in a criminal case, may state that the evidence supporting a given fact is undisputed (if such is the case). However, the court should not declare as fact that which the undisputed evidence tends to show. *People v Pratt,* 251 Mich 243; 231 NW 564 (1930); *People v Wojnicz,* 12 Mich App 423; 162 NW2d 904 (1968). Standing alone, the challenged instruction would constitute a partial directed verdict of guilty and would be reversible error. *People v Pratt, supra; People v DeFore,* 64 Mich 693; 31 NW 585 (1887); *People v Brian Harris,* 37 Mich App 409; 195 NW2d 29 (1971); *People v Wojnicz, supra.*

Each information charged defendant with first-degreee murder. During his opening statement defense counsel declared:

> "Members of the jury, you will hear, indeed, as the prosecutor has indicated to you, that on June 7th or June 8th of last year, two people met their death unnaturally, and in what probably can be characterized as a brutal and repulsive manner. You will be asked in this case to decide whether Mr. Reed is guilty of their murder. That will be the question. *Not whether or not these people died. Not whether or not these people were murdered. That they met their death unnaturally, I think that will be quite clear.*" (Emphasis added.)

In *People v Griffen,* 36 Mich App 368, 371; 194 NW2d 104, 105 (1971), which involved a prosecution for second-degree murder, the trial judge in his charge to the jury stated:

> "I may say that I don't believe this jury is going to have much difficulty in arriving at the conclusion that a felonious homicide was committed, and that the homicide was second-degree murder."

This Court held (p 371; 194 NW2d p 105):

> "The comment was improper, and if the fact that a homicide had been committed had been disputed, it would require reversal, *People v Wichman,* 15 Mich App 110; (1968). However, the fact that a homicide had been committed was not disputed at trial. The contest was over who did it and defendant's defense was that he did not do it. If the comment was error, it was not reversible error."

The defense theory in the instant case, consistently followed during the course of the trial, was that defendant was not in the apartment at the time of the homicides. In view of that theory, the fact that each information charged defendant with *first-degree murder,* and defense counsel's above-quoted statement, defendant was not prejudiced by the trial court's instructions which limited the jury's consideration to a question of identification of the perpetrator of the crime, where the fact that the crime had been committed was not in dispute. See *People v Daleo,* 43 Mich App 386; 204 NW2d 315 (1972); *People v Spaulding,* 42 Mich App 492; 202 NW2d 450 (1972); *People v Allen,* 42 Mich App 195; 201 NW2d 353 (1972); *People v Griffen, supra.*

We have carefully considered defendant's remaining allegations of error and find that they do not merit discussion.

Affirmed.

APPENDIX B

Opinion of the Michigan Supreme Court

Williams, J. Blood stains and drag marks led police from two bound and gagged dead bodies found in an alley to defendant's apartment. On request of the police to enter and look around, defendant opened his apartment door resulting in the search of the apartment's rooms and defendant's questioning and arrest.

Defendant claimed 11 different trial errors, of which we find it useful to discuss only the following 5:

(1) Was there error in instructing the jury that the killings were murder in the first degree as a matter of fact and law?

(2) Was it error to limit the scope of a *Brady* hearing so as to preclude cross-examination of one prosecutor and the appearance of another requested by the defense concerning alleged promises to a prosectuion witness?

(3) Was it erroneous for the trial judge to refuse to rule whether defendant's suppressed confessions could be used to impeach him if he testified?

(4) Where the trail of evidence seemed to lead to defendant were *Miranda* warnings required before the police began questioning defendant?

(5) Was error committed in admitting evidence seized as a result of the warrantless search of defendant's apartment?

We answer all but question (5) in the affirmative and reverse and remand for a new trial.

I—*Facts*

Following their discovery of two bodies in an alley early in the morning of June 8, 1971, Detroit police officers followed a trail of blood stains and drag marks into a nearby apartment building. With the assistance of the apartment manager, they searched the basement and three of the four apartments without a warrant. Upon reaching the fourth apartment belonging to defendant, the officers testified they "stated [to defendant] that we would like to come in and take a look around." The police thereupon entered and made an extensive search. They found a pair of blood-stained trousers soaking in the sink. When the police first asked the defendant about the trousers, he said they were his, and the blood was his from a cut from a lawn mower. A policeman then said "if the blood on those trousers matched the blood from the two bodies found in the alley, he [defendant] was going to be in trouble." Defendant then changed his story and said he had found the trousers and taken them because they appeared to fit. Defendant was then arrested and after that given his *Miranda* warnings.

Defendant was tried by a jury for first-degree murder on separate informations for each decedent. Among witnesses for the prosecution were two individuals who testified they had assisted defendant. Apparently neither was ever imprisoned for his role, and the case against at least one was dropped. Defendant did not testify.

The jury returned a verdict of murder in the first degree in both cases on March 21, 1972. The Court of Appeals affirmed on August 30, 1973. 49 Mich App 308; 212 NW2d 41 (1973). Defendant claimed 11 errors including the 5 heretofore set forth above.

II—*Was There Error in Instructing the Jury That the Killings Were Murder in the First Degree as a Matter of Fact and Law?*

In instructing the jury, the trial judge stated:

"I am going to describe for you or define for you briefly what the charge of murder encompasses. The reason I am not going into it with you in any more extensive detail is the fact that *there has been no dispute about the fact here that the offense charged, that is murder in the first degree, is the offense that was committed.* The issue, of course, will be whether the defendant is guilty of committing that offense. Now, murder at common law, and as charged in this Information, is defined as being where a person or persons of sound memory and discretion wilfully and unlawfully kill any human being against the peace of the state with malice aforethought expressed or implied. Murder of the first degree is a killing done wilfully and with premeditation. And when we talk about premeditation, we mean to consider or plan the act of killing beforehand. And as I have said, *I am instructing you both as a matter of fact and as a matter of law in connection with these proceedings, that the killings here are murder in the first degree.*" (Emphasis added.)

Defendant objected to this instruction.

The Court of Appeals, in finding no error, emphasized certain statements of defense counsel in his opening remarks as follows:

> "You will be asked in this case to decide whether Mr. Reed is guilty of their murder. That will be the question. *Not whether or not the people died. Not whether or not these people were murdered. That they met their death unnaturally, I think that will be quite clear.*" (Emphasis added.) 49 Mich App 308, 327.

The Court of Appeals then pointed out that the defense theory throughout was alibi. It concluded that that theory and defense counsel's above statement created no prejudice, although the court's instructions "limited the jury's consideration to a question of identification of the perpetrator of the crime, where the fact that the crime had been committed was not in dispute." 49 Mich App 308, 328.

This is not the law.

Once a plea of not guilty is entered, the defendant "has an absolute right to a jury determination upon all essential elements of the offense. This right, emanating from the criminal defendant's constitutional right to a trial by jury, is neither depleted nor diminished by what otherwise might be considered the conclusive or compelling nature of the evidence against him. • • • [F]urthermore, in a situation wherein an understandingly tendered waiver is not forthcoming from the defendant, under no circumstances may the trial court usurp this right by ruling as a matter of law on an essential element of the crime charged." *United States v England*, 347 F2d 425, 430 (CA 7, 1965). (Footnote omitted.)

The trial judge must carefully ensure that there is no trespass on this fundamental right.

The instruction to the jury must include all elements of the crime charged, *People v Liggitt*, 378 Mich 706, 714; 148 NW2d 784 (1967); *People v Pepper*, 389 Mich 317, 322; 206 NW2d 439 (1973), and must not exclude from jury consideration material issues, defenses or theories if there is evidence to support them. 22 Michigan Law & Practice, Trial, § 236, p 386.

In the instant case, the trial court charged:

> "[T]here has been no dispute about the fact here that the offense charged, that is murder in the first degree, is the offense that was committed."

Such an instruction is patently wrong. The presence of two dead bodies alone cannot reveal the state of mind of the killer nor the full circumstances of the killing. Without such additional evidence it is impossible to know what degree of homicide was committed

Obviously it cannot be presupposed, as the instruction did, that first-degree murder was involved for two reasons. First, it cannot logically be presumed that it was murder in the first degree without knowing that the killer had the necessary premeditation and intent. This would require proof beyond the existence and condition of the dead bodies. Second, it cannot legally be presumed for the reason that the necessary premeditation and intent are elements of the crime the prosecution must prove. By instructing as she did, the trial judge incorrectly removed these problems from jury consideration.

The prosecution urges us to accept the rule of *People v Griffen*, 36 Mich App 368; 194 NW2d 104 (1971), and cases relying thereon.[1] In *Griffen*, the trial judge instructed:

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[1] *E.g.*, *People* v *Daleo*, 43 Mich App 386, 392; 204 NW2d 315 (1972); *People* v *Spaulding*, 42 Mich App 492, 497-498; 202 NW2d 450 (1972).

> "'I may say that I don't believe this jury is going to have much difficulty in arriving at the conclusion that a felonious homicide was committed, and that the homicide was second-degree murder'." 36 Mich App 368, 371.

The Court of Appeals with a strong dissent by Justice (then Judge) Levin on another issue, found that, if there was error, it was not reversible, inasmuch as the only dispute at trial was over who committed the homicide.

We find that the right of the jury to determine all elements of an offense is so fundamental a right that the harmless error rule is not appropriate where the judge invades that province. There is a difference between commenting on the evidence and making a finding of fact for the jury. When the trial judge, as in the instant case, instructs that an essential element of a criminal offense exists, as a matter of law, we will find reversible error. Insofar as *Griffen* and progeny contravene this principle, they are overruled.

III—Was it Error to Limit the Scope of a Brady *Hearing to Preclude Cross-Examination of One Prosecutor and the Appearance of Another Requested by the Defense Concerning Alleged Promises to a Prosecution Witness?*

A principal witness against defendant was John Zellner. Zellner was charged as defendant's accomplice in the murder of Glenn Williams. Zellner's motion for bail was originally denied, but subsequently both bail and severance from defendant were granted. (Ultimately, after this trial, his case was dismissed.) On the basis of these suggestive

facts defendant asked for a *Brady*[2] hearing to determine whether any promises had been made to Zellner to testify against defendant.

In the *Brady* hearing, Zellner's counsel stated he had advised a police officer and the trial prosecutor that Zellner was willing to testify against defendant but denied receiving any consideration therefor. Both the police officer and his partner denied on the stand that there was any agreement. The trial court questioned the trial prosecutor not under oath, and he denied any promises. The Chief of the Recorder's Court Division of the Prosecutor's Office, who was present when Zellner was admitted to bail, was not called upon to testify. Defense sought unsuccessfully to cross-examine the trial prosecutor and was likewise unsuccessful in calling the Division Chief to the stand.

The issue before this Court is whether the trial judge committed error when she refused to permit, during this hearing, cross-examination of the trial prosecutor or direct examination of the Chief of the Recorder's Court Division of the Wayne County Prosecutor's office.

The trial judge justified this limitation by first noting that as an officer of the court, the prosecutor would of course tell the truth,[3] and by claiming that no connection had been established between the Recorder's Court Division Chief and the defendant-accomplice.

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[2] This is held outside the hearing of the jury. Authority is based on *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

[3] The trial judge explained:

"You are not going to cross-examine Mr. Bahen. Mr. Bahen is an officer of this Court. And if Mr. Bahen simply tells me—and I wouldn't even have him sworn—if he tells me he had no such communication, the Court will accept that without any more."

Defendant argues that a determination of whether the witness had a motive to falsify testimony against him, and a determination of whether the prosecution was withholding information about promises or representations made to him was crucial to the case. Once a hearing is held, he urges, it is the judge's duty to permit counsel to call all who could help reveal the truth.

In *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), the United States Supreme Court held[4] that to secure a fair trial to the accused:

> "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 US 83, 87.

Napue v Illinois, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959), stated that:

> "The principle * * * does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence * * *."

In the instant case, the trial judge's refusal to permit defense counsel to proceed with his questioning was based on two different reasons. Denial of the right to cross-examination of the prosecutor on the basis of the court's estimate of his credibility as a witness is improper, particu-

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[4] *Moore v Illinois*, 408 US 786, 794-795; 92 S Ct 2562; 33 L Ed 2d 706 (1972), codified the *Brady* rule to require: "(a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence".

larly since the *Brady* hearing is specifically designed to elicit information from the government and its representatives. While we agree with the trial judge that an officer of the court would not be inclined to lie, the essence of the adversary process is not to discover perjury, but rather to reveal the truth. Therefore, preventing cross-examination of the prosecutor in the instant case improperly denied counsel a most valuable tool, if not to find out what the prosecutor did, to find out what someone else did.

Denial of permission to call the Chief of the Prosecutor's Recorder's Court Division presents an issue of materiality. We hold that sufficient connection had been demonstrated in his appearance at the witness's request for bail.

As *Giglio v United States,* 405 US 150, 154; 92 S Ct 763; 31 L Ed 2d 104 (1972), and *Napue* have both determined, evidence concerning the credibility of a witness is relevant toward ensuring that defendant receives a fair trial. This is still the law in Michigan. In *People v Evans,* 30 Mich App 361; 186 NW2d 365 (1971), the Court of Appeals found reversible error in the trial court's refusal to allow the jury to be told that defendant's accomplice and codefendant who had testified against him was permitted after testifying but before the jury went out to plead to a lesser offense. See also *People v Bortnik,* 28 Mich App 198; 184 NW2d 275 (1970).

Therefore, we hold that the trial judge erroneously limited the scope of the *Brady* hearing, and that once requested, such a hearing should include all witnesses and all evidence which can reasonably cast light on the question to be determined.

IV—Was it Erroneous for the Trial Judge to Refuse to Rule Whether Defendant's Suppressed Confessions Could be Used to Impeach Him if He Testified?

Shortly after his arrest, defendant Ike Reed, because of promises made to him by police officers, confessed to the killings. As a result of its involuntary nature, the confession was suppressed as evidence in the presentation of the people's case in chief, but the pretrial order also expressly observed that use of the statements for impeachment purposes was reserved for decision by the trial judge.

At trial, defense counsel asked the judge how she would rule if defendant chose to testify and if the prosecutor attempted to impeach him by use of the suppressed statements. She refused to make a ruling in advance, but asked for a formal offer of proof. No offer of proof was made and defendant did not testify.

The Court of Appeals, relying on *Harris v New York*, 401 US 222; 91 S Ct 643; 28 L Ed 2d 1 (1971), and *People v Graham*, 386 Mich 452; 192 NW2d 255 (1971), ruled that the defendant's objection to the use of the confessions for impeachment was "unfounded". 49 Mich App 308, 324-325. We believe the objection sound and *Harris* and *Graham* not on point.

The difference between *Harris* and *Graham* and the instant case is that the former relate to impeachment because of failure to give due *Miranda* warnings, and the instant case relates to *involuntary confessions*. In order to deter the police from breaking the law, statements made prior to the *Miranda* warnings are unusable to prove the elements of the crime charged. However, such state-

ments may still be used for impeachment purposes if otherwise trustworthy. Involuntary confessions, on the other hand, may never be used, both because the police broke the law but more importantly because an involuntary confession is always of questionable "trustworthiness". Consequently, an involuntary confession, which is of questionable trustworthiness, is not a proper foundation for impeachment, whereas statements prior to *Miranda* warnings may be a perfectly sound foundation for impeachment. It is instructive to note *Harris* expressly states, "[p]etitioner makes no claim the statements made to the police were coerced or involuntary." 401 US 222, 224. Furthermore, *Harris* permits *Miranda*-barred evidence to impeach "provided of course that the *trustworthiness* of the evidence satisfies legal standards". (Emphasis added.) 401 US 222, 224.

As indicated, the impropriety in using an involuntary confession for impeachment purposes is that it is untrustworthy evidence either to prove guilt or impugn credibility. The Supreme Court of Oregon put it forcefully and persuasively in *State v Smith*, 242 Or 223, 226; 408 P2d 942, 944 (1965), as follows:

> "An involuntary confession is just as untrustworthy when used for impeachment purposes as when used to prove guilt. Such a confession is of no greater credibility when used to prove defendant a liar than when it is used to prove him guilty."

We therefore hold that an involuntary confession because of its untrustworthy evidentiary value is not usable

either as direct evidence or for impeachment purposes.[5] The trial judge erred in not ruling that the involuntary confessions could not be used for impeachment, as did the Court of Appeals in supporting her.

V—*Were* Miranda *Warnings Timely Given?*

In determining whether the investigation had become accusatory and the defendant entitled to his *Miranda* warnings, the Court of Appeals applied the rule in *People v Wasson,* 31 Mich App 638, 642; 188 NW2d 55 (1971), that the "deciding factor, in each case, is determined by examining the specificity of the investigation, *i.e.,* whether the investigation has focused on one suspect". 49 Mich App 308, 319. The Court of Appeals concluded there was not such focus. We approve the test employed and believe it should be used by examining the totality of the circum-

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[5] See 89 ALR2d 480:

"The weight of authority supports the rule that a defendant in a criminal prosecution who is a witness in his own behalf cannot be compelled on cross-examination to testify with respect to statements made by him out of court which amount to a confession of the crime, unless it is first shown that the confession was voluntary or, in some instances, was otherwise properly qualified for admission, and that this is true even though the evidence is offered by the prosecution, not as a confession, but merely as a contradictory statement for the purpose of impeaching the defendant as a witness in his own behalf."

stances.[6] However, we disagree with the Court's conclusion.

Following discovery of the two bodies in the alley, the police followed a trail of blood and drag marks into a four-apartment building. The dead bodies exhibited signs to the police of narcotic use and they suspected that the homicide was narcotics-connected. Finding no evidence of homicide in the first three apartments, the police sought entrance into the fourth and final apartment from the manager, but his key did not fit. Officer Clemons testified that at this point defendant came down the hall and put his key into the door. Officer Clemons testified "He [the defendant] affirmed that he did live here and that we may come in". Officer Hill testified similarly.[7] As the offiicers entered, from the way the door opened and the way the windows were barred and from the presence of narcotics paraphernalia, "it was at once apparent that this was a narcotics pad".

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[6] Professor Kamisar suggests these guidelines for determining whether investigation is custodial:

"'(1) The subjective intention of the questioning officer to hold the person or to arrest him? (2) The degree to which the investigation has "focused" on the person, or, a variation of the same approach, whether or not the police have "probable cause" to arrest the person? (3) The subjective belief of the person that he is significantly deprived of his freedom? (4) The belief of the person, as a "reasonable man" that his freedom is significantly impaired?' He maintains that approach (4) should be controlling. Kamisar, 'Custodial Interrogation' within the meaning of *Miranda*, Criminal Law & the Constitution 335, 362 (Reed et al. eds. 1968)." Quoted in 3 Wigmore on Evidence (Chadbourne rev), § 826a, p 386, fn 26.

[7] Officer Hill testified:

"I identified myself as a police officer and * * * I asked him if he lived there and he said he did and we told him we would like to have a look around if he didn't mind."

The police proceeded from the living room to the bedroom and from there to the kitchen. The bedroom floor showed it had recently been cleaned and there was a wet mop with red-tinged water on it. This caused the police to suspect that there had been blood on the floor.

The police also found some trousers soaking in red-tinged water that appeared to indicate blood. The trousers themselves seemed marked with the remains of blood stains.

At this point Officer Clemons admitted the police "had, perhaps, found the scene of the homicide" and that the defendant "perhaps knew something about" the homicide and "[m]ore than that, perhaps".

In view of narrowing their investigation down to what they believed to be the place of the homicide and to the owner of that place, the defendant, whom they believed to be connected with that homicide, by knowledge and "[m]ore than that, perhaps", the question arises whether the investigation had not "focused". This question is important because the police, without giving a *Miranda* warning, had the following colloquy with defendant as reported by Officer Hill:[8]

"A. Yes, we questioned the defendant about the trousers and the suspected blood stains on them. He

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[8] Officer Hill at the *Miranda* hearing testified that "We never really suspected him" even after the first question. "I thought he was a flunky. I thought he was sent there to clean up the place for someone else. I never suspected Mr. Reed." However, on direct, Officer Hill had earlier testified that before going into defendants apartment, he and his partner asked defendant if he lived there and "he replied in the affirmative". Also the question about whether or not defendant lived in the apartment and the answer that "he worked for George Baker at that address" was not until after the officers questioned defendant and he denied his statement about the trousers.

stated that they were his trousers and that he had injured himself while playing around with a lawn mower on Marlborough and at this time we told him that we had someone coming out from the scientific lab to check the water and the floor and the walls for blood and that if the blood on the trousers matched the blood of the deceased that we found in the alley, there might be a little trouble.

Q. Did he make any response to this answer?

A. Yes, he changed his statement.

* * * * *

A. He changed his statement with relationship to the trousers at first.

Q. What did he tell you about the trousers the second time?

A. He stated the second time the trousers were not his; he found them on the rear steps, so [*sic*] they probably would fit him and probably meamt to soak them.

* * * * *

A. At this time we advised the defendant of his constitutional rights."

Before this colloquy then, we must ask ourselves, "had the investigation 'focused' on the defendant?"[9]

From the above facts there can be no question but that the investigation had "focused" on the murder site.

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[9] At the time the question and statement were put there appears to have been at least three officers in the defendant's apartment. There may have been six to ten more, although that many may not have been present at one time or at that particular point of time. Im any event, the defendant was far from alone.

Had the investigation "focused" as well on "one suspect"? The defendant had the key to the apartment and was in fact entering it. When the police asked him, he said it was his apartment. The only question left was were the bloody pants the defendant's—if they were, Officer Hill indicated that would tend to link the defendant with the murders.

The ultimate question then really is whether the interrogation about defendant's ownership of the trousers was merely preliminary exploration or was it the "clincher"? Looking at all the facts, the latter alternative seems by far the more reasonable.

As a consequence we hold that the investigation had focused on defendant before the trouser-ownership question was asked and that the defendant therefore should have been given a *Miranda* warning before that question was asked.

VI—Was the Search Reasonable as One to Which Defendant Gave His Valid Consent?

Defendant made a pretrial motion to suppress certain incriminating evidence[10] seized by police officers in his

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[10] At the evidentiary hearing, defense counsel reported that the evidence consisted of the following:

"Mr. Ziemba: Seized, so far as the defendant can determine a vial of 4 cc of bloodstained water taken from the kitchen; a small drop of blood taken from the bedroom floor, a small drop of blood wiped off, scraped off the bedroom floor, the foot of the bed, a pair of orange striped dacron knit slacks found soaking in the kitchen and a pair of red crush leather and smooth leather loafers taken from the defendant; a blue-green, yellow, red and yellow top blanket taken from the porch and three drinking glasses taken from the drainboard of

(*continued on next page*)

apartment, contending that, as he did not know he could refuse permission for them to enter, he did not knowingly waive his Fourth Amendment rights and validly consent to the search.

At the evidentiary hearing, testimony was received from police officers and the apartment manager that the police, without a search warrant, had, upon their discovery of the bodies in the alley and the drag marks and blood stains leading into the building, followed that trail, and, with the aid of the apartment manager, investigated three of the four apartments, finding nothing to connect them with the homicides.

When the apartment manager's key would not fit into the lock of the fourth apartment, belonging to defendant, the police were in the manager's office, directly across the hall, telephoning the scientific laboratory for assistance. Defendant fortuitously appeared at the door and placed his key in the lock. The police approached him, and, according to their testimony and that of the manager, identified themselves and asked if they might come in and look around. They said defendant was not only courteous and

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(*continued from preceding page*)

the kitchen sink; a syringe marked off in units; a disposable hypodermic needle and plastic eyedropper; a red metal screw tap which was taken from the kitchen cabinet, a wet mop taken from the kitchen; 3, 22 caliber 85 gold toned bullet [sic] on evidence tag 959799 and a packet of narcotics on evidence tag 965405; identification papers of the defendant on evident [sic] tag 965416 and upper dentures on evidence tag 965487; miscellaneous keys, one brass bell, pad, electric bill, one 22 caliber cartridge, one three-foot length plastic clothes line, one plastic bag and extension cord and towel on evidence tag 965403. These are the items that the defendant knows of and there may be other items seized by the police unknown to the defendant."

genial, but also pointed out places to look. They indicated that at no point was he restrained and that defendant was not given his *Miranda* rights at that time because he was not suspected of anything. There were initially at least three, and perhaps four, officers in the apartment, with the number of police personnel, including those from the lab, finally totaling ten.

Defendant, however, testified that he was ordered to open the door by two detectives and two patrolmen, that he insisted on their showing him a search warrant, and that they pushed their way into the apartment. Once they were inside, he said there was a "fight" (which he defined as not physical) in which he again demanded to see a warrant and the police forced him to sit down while they searched.

At the conclusion of the evidentiary hearing, the court ruled that defendant had validly consented to the search of his apartment. The Court of Appeals affirmed.

A warrantless search and seizure is unreasonable per se and violates the Fourth Amendment of the United States Constitution and art 1, § 11 of the state constitution unless shown to be within one of the exceptions to the rule. 20 Michigan Law & Practice, Searches & Seizures, § 2. The burden is always on the state to show such an exception exists. *People v Chism,* 390 Mich 104, 123; 211 NW2d 193 (1973). *Coolidge v New Hampshire,* 403 US 443; 91 S Ct 2022; 29 L Ed 2d 564 (1971).

In the instant case, the government argues that defendant's valid consent rendered the search reasonable. "Whether a consent is valid is a matter of fact based upon the evidence and all reasonable inferences to be drawn from it." 390 Mich 104, 123. The presence of coercion or duress

would require a finding that consent was not given. *People v Kaigler*, 368 Mich 281, 294; 118 NW2d 406 (1962).

The Court of Appeals correctly noted that the United States Supreme Court has rejected defendant's contention that knowledge of the right to refuse admittance to police is required before consent to a search can be considered valid. The law today is that knowledge of the right to refuse is but one factor in the totality of circumstances to be examined in construing the reasonability of a search.

> "[W]hen the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecutor is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent." *Schneckloth v Bustamonte*, 412 US 218, 248-249; 93 S Ct 2041; 36 L Ed 2d 854 (1973).

Refusing to apply the *Johnson v Zerbst* standard that the state must demonstrate "an intentional relinquishment or abandonment of a known right or privilege"[11] in order to show consent to a search, 412 US 218, 238-245, the Court in *Schneckloth* indicated these general principles should be followed:

(1) "While the Fourth and Fourteenth Amendments limit the circumstances under which the police can conduct

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[11] 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938).

a search, there is nothing constitutionally suspect in a person's voluntarily allowing a search." 412 US 218, 242-243.

(2) "[U]nlike those constitutional guarantees that protect a defendant at trial, it cannot be said every reasonable presumption ought to be indulged against voluntary relinquishment." 412 US 218, 243.

(3) "[T]he community has a real interest in encouraging consent * * * ." 412 US 218, 243.

(4) A waiver approach is unrealistic in "the informal, unstructured context of a consent search", and would be inconsistent with third-party consents.[12] 412 US 218, 245.

(5) Absent evidence of inherently coercive tactics, either from the nature of police questioning or conduct, or the environment and atmosphere in which events occur, traditional tests for determining voluntariness of consent will apply. 412 US 218, 247.

(6) "[T]he failure to require the Government to establish knowledge as a prerequisite to a valid consent" will not "relegate the Fourth Amendment to the special province of 'the sophisticated, the knowledgeable and the privileged.'" 412 US 218, 247-248.

Analogizing to the problem of coerced confessions, the Court found these criteria did not turn on the presence or absence of a single factor, but required careful scrutiny of the totality of all the surrounding circumstances. Applying these *Schneckloth* criteria, we find the following facts made up the relevant circumstances:

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[12] No argument is raised in the instant case that had his key fit, the apartment manager could have validly consented to the search of defendant's rooms. Of course, an owner and his or her agent may not consent to search for a tenant unless the right is contracted for. *Chapman v United States*, 365 US 610; 81 S Ct 776; 5 L Ed 2d 828 (1961):

(1) The police followed a trial of blood stains and drag marks from two bodies into an apartment building and had already searched all other apartments when they reached defendant's. They had no search warrant.

(2) The apartment manager tried to let the police enter defendant's apartment, but his key would not work.

(3) The police were in the doorway of the manager's apartment, directly across the hall, when they saw defendant come to his door and insert his key.

They say they identified themselves, asked whether defendant lived there, and when he answered yes, asked if they could come in and look around. They did not give defendant *Miranda* warnings at that time, nor did they advise him of his right to refuse admission. They also did not tell him why they were there.

The police say defendant granted permission for the police to enter and look around. Defendant claims he was forced to let the police in and asked to see a search warrant.

(4) The police made one hasty swing through the apartment, then made a more careful search, with the aid of persons from the scientific bureau. There were at least six police questioning him about bloody trousers found soaking in the apartment of defendant.

(5) Defendant was given his *Miranda* rights after the police questioned him about bloody trousers found soaking in water in the sink. At that time he was arrested. The search was still proceeding.

(6) Following their initial entrance into the apartment, the police asked other officers and the scientific personnel to enter. Defendant was never asked if these additional people could come in and search.

(7) The police testified that defendant was not only free to wander around the apartment, but also pointed out places for them to search. Defendant says he was forced to remain seated, but was not handcuffed until he was arrested.

The trial court and the Court of Appeals found that the defendant had validly assented to the police entry and search. Upon review of the evidence this Court reaches the same conclusion. There is sufficient evidence to support a holding that the police asked permission to enter and that consent was given to a general search. Further, just as the mere fact of custody without more, does not necessarily render consent involuntary, *United States v Jordan*, 399 F2d 610, 614 (CA 2, 1968), the presence of a large number of officers in an apartment does not present a situation which is per se coercive.

The United States Supreme Court in *Schneckloth* implied that situations where *Miranda* warnings were required may still not be such as to invalidate consent to a search.[13] The instant case is such a situation.

The trial court's and the Court of Appeals' holdings that consent was validly given to the search and that the evidence was correctly not suppressed were not clearly erroneous. We affirm.

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[13] "We decline to follow what one judicial scholar has termed 'the domino method of constitutional adjudication * * * wherein every explantory statement in a previous opinion is made the basis for extension to a wholly different situation.' " 412 US 218, 246, quoting Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Cal L Rev 929, 950 (1965).

VII—*Conclusion*

In view of our previous findings of error, we believe it unnecessary to reach defendant's other claims of error, most of which would not be necessarily pertinent to another trial in any event. However, the majority of this Court agree with defendant's objection to the introduction of the specified photographs of the nude dead bodies. *People v Falkner,* 389 Mich 682; 209 NW2d 193 (1973).

The Court of Appeals and the trial court are reversed. We remand for new trial not inconsistent with this opinion.

T. G. Kavanagh, C.J., and T. M. Kavanagh, Swainson, Levin ,and J. W. Fitzgerald, JJ., concurred with Williams, J.

M. S. Coleman, J., concurred in the result.

APPENDIX C

STIPULATION FOR SUPPRESSION OF CONFESSIONS

(State of Michigan—Recorder's Court—City of Detroit)

(Filed .....)

It is hereby stipulated by and between William L. Cahalan, Esq., prosecuting attorney for the County of Wayne, by Thomas Behan, assistant prosecuting attorney, and Carl Ziemba, attorney for defendant, Ike Lawrence Reed, as follows:

1—that an order of the Court may enter suppressing as evidence in the presentation of the People's case in main in the above entitled matter any and all confessions and admissions made by defendant, Ike Lawrence Reed, following his arrest on or about September 18, 1971, to any police officer whatever;

2—that it is specifically and expressly understood and admitted by the stipulating parties that the confessions and admissions referred to in paragraph 1 hereof were involuntary inasmuch as they were induced by promises made to him by police officers;

3—that the question of the use of any or all of the admissions and confessions referred to in paragraph 1 hereof by the People for impeachment purposes shall be re-

served for the decision and ruling of the judge who shall preside at the trial of the above cause.

William L. Cahalan
Prosecuting Attorney
Wayne County

By: /s/ Thomas Bahen
Assistant Prosecuting Attorney
/s/ Carl Ziemba
Attorney for Defendant
1900 Penobscot Building
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Dated: Michigan, Detroit, November 20, 1971.